

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1978  
NO. 78 - 287

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SUPREME COURT, U.S.

THE PEOPLE OF THE STATE OF NEW YORK,  
  
Petitioner,  
  
-against-  
  
ANTHONY BLANKS,  
  
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT  
OF CERTIORARI

Respondent submits this brief in opposition to the  
captioned petition for a Writ of Certiorari pursuant to Rule 24.

The attached papers are prepared in conformity with  
Rule 47.

STEPHEN J. PITTARI, ESQ.  
Attorney for Respondent  
Office & Post Office Address  
One North Broadway  
White Plains, New York 10601  
(914) 682 - 0250

By: PETER A. MEISELS, ESQ.  
ROBERT W. STIEVE, ESQ.  
Of Counsel

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## FACTS

Anthony Blanks, a college student, unable to find employment, left his home in St. Louis, Missouri on October 8th, 1976 arriving in New York on October 9th, 1976 by train. Having left his personal belongings with relatives in New York City, he began walking along the Penn Central railroad tracks (New Haven Division) in an easterly direction, away from the heart of the city.

Being totally without funds, he proceeded along the tracks for almost two days without food or sleep.

As a result of physical and emotional stress, he did not hear an eastbound commuter train which almost struck him from the rear. Despite repeated whistle warnings which were audible for one mile, Mr. Blanks failed to move from the tracks thereby forcing the train into an emergency stop. He was missed by a matter of a few feet. Larchmont, New York, police were notified and responded.

Mr. Blanks who was unarmed, committing no crime and who had no prior conflict with the law was confronted by Police Officer Arthur DeMatte. An altercation ensued. The officer who was armed with a gun and knife, but not with a nightstick, drew his revolver. Mr. Blanks in fear of his life, struggled over the gun with the officer. As a result of that struggle, the officer was fatally wounded with his own weapon.

At the trial of this matter, two psychiatrists testified that Mr. Blanks was suffering from an extreme emotional disturbance at the time the officer was shot. In addition to extensive interviews with Mr. Blanks, their opinions were based upon the results of psychological testing and medical records of Mr. Blanks' prior efforts to obtain psychiatric treatment. Four psychiatrists, including the two defense witnesses mentioned above and two called by the District Attorney, testified that he suffered from an unstable personality.

The jury, having been advised by the trial judge that this was not a capital case and that the death penalty could not be imposed, found Mr. Blanks guilty of Murder, in the First Degree.

Pursuant to the authority of People v. Davis, 43 N.Y. 2d 17, 400 N.Y.S. 2d 735, 371 N.E. 2d 456 (1977), cert. den. sub. nom. New York v. James, \_\_\_\_\_ U.S. \_\_\_\_\_ (June 27, 1978), the trial judge declined to impose the death penalty and sentenced Mr. Blanks to life in prison.

It should be noted that this case originally proceeded to trial prior to the decision in Davis, supra., at which time the jury was informed that a conviction would mandate a death sentence without regard for any mitigating factors. The initial trial resulted in a mistrial based upon a hung jury evenly divided for acquittal on the capital charge of Murder, in the First Degree.

#### POINT I

#### NO FEDERAL QUESTION WAS DECIDED IN THE STATE COURTS BELOW.

As a matter of New York State law, the Trial Term of the Supreme Court of the State of New York was bound to follow the State Court of Appeals decision issued in People v. Davis, 43 N.Y. 2d 17, 400 N.Y.S. 2d 735, 371 N.E. 2d 456 (1977), cert. den. sub. nom. New York v. James, \_\_\_\_\_ U.S. \_\_\_\_\_ (June 27, 1978). A legal determination by the state's highest court must be followed uniformly throughout the state. Consequently, the Appellate Division of the Supreme Court was bound by the same authority.

The state courts never decided the question raised in Point I of petitioner's brief at any stage of the proceedings in this case (Appendix A and Appendix B of petitioner's brief). Unless it appears from the record that a federal question was both raised and decided in the state courts, this court is without jurisdiction to review the judgment herein. 28 USCS 1257 (3); Southwestern Bell Telephone Co. v. Oklahoma, 303 U.S. 206 (1938); Cardinale v. Louisiana, 394 U.S. 437 (1969).

## POINT II

THE NEW YORK MANDATORY DEATH PENALTY STATUTE WHICH DOES NOT PERMIT THE SENTENCER TO CONSIDER ANY MITIGATING FACTORS SUCH AS THE CHARACTER AND PRIOR RECORD OF THE OFFENDER OR THE PARTICULAR CIRCUMSTANCES OF THE OFFENSE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respect for human dignity requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the death sentence. Because every offender is a uniquely individual human being, not a member of a faceless, undifferentiated mass to be subjected to the blind infliction of death, Penal Law Section 60.06 (text reproduced in petitioner's brief, Page 33a) violates the Eighth and Fourteenth Amendments to the United States Constitution. Woodson v. North Carolina, 428 U.S. 280 (1976).

Even if the offense in question were narrowly defined, as petitioner alleges, fundamental respect for humanity requires that the sentencer be permitted to consider mitigating circumstances

such as the lack of any prior convictions<sup>1</sup> or the existence of an extreme emotional disturbance which might attend the killing of a peace officer.<sup>2</sup> Harry Roberts v. Louisiana, 431 U.S. 633 (1977). Under present New York State law, evidence of an extreme emotional disturbance, an affirmative defense, may only be considered by the trial jury if the accused is able to establish such a disturbance by a preponderance of the evidence. Penal Law Section 125.27 (2) (a) (statute reproduced in petitioner's brief, Page 37a); Patterson v. New York, 432 U.S. 197 (1977). The sentencer is precluded from consideration of evidence of emotional disturbance unless the accused can meet that burden of proof at the trial stage of the proceedings.

To meet constitutional muster, a death penalty statute must provide a meaningful basis for distinguishing cases in which death is imposed and those in which the life of the offender shall be spared.

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1. Anthony Blanks has sustained no prior conflict with the law whatsoever which the trial court found to be an important mitigating factor on sentence. (petitioner's brief, appendix C, page 25a).

2. Two psychiatrists called by defense testified that Anthony Blanks suffered from an extreme emotional disturbance at the time of this incident. Four psychiatrists, two called by the defense and two called by the prosecution, testified that Anthony Blanks suffered from an unstable personality.



Consideration of the offender's lack of criminal record is vital. Clearly, the offender's character, prior record and degree of participation are relevant. The circumstances surrounding the incident, which may not give rise to a legal defense, may be critical to the selection of the appropriate, individualized sentence.<sup>3</sup> Lockett v. Ohio, \_\_\_\_ U.S. \_\_\_\_ No. 76-6997 and Bell v. Ohio, \_\_\_\_ U.S. \_\_\_\_ No. 76-6513 (July 3, 1978).

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3. As the trial judge indicated, the offense herein was clearly not premeditated (petitioner's brief, appendix C, page 26a).

#### CONCLUSION

New York State Penal Law Section 60.06, which this court declined to review in the James case, supra., does not permit the sentencer to consider relevant mitigating factors which an offender may reasonably proffer as a basis for a sentence less severe than that of death. Consequently, said statute violates the Eighth and Fourteenth Amendments to the United States Constitution.

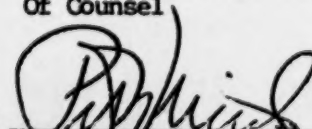
The Petition for a Writ of Certiorari should be denied.

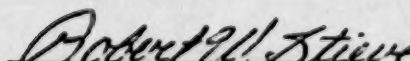
Respectfully submitted,

STEPHEN J. PITTARI, ESQ.  
Attorney for Respondent  
Office & Post Office Address  
One North Broadway  
White Plains, New York 10601  
(914) 682-0250

By: PETER A. MEISELS, ESQ.  
ROBERT W. STIEVE, ESQ.  
Of Counsel

By:

  
Peter A. Meisels

  
Robert W. Stieve